

Department of Planning, Building and Code Enforcement  
801 North First Street, Room 400  
San José, California 95110-1795

P.C. 06/09/04 Item: 3.a.

File Number  
CP04-002

Application Type  
Conditional Use Permit

Council District  
5

Planning Area  
Alum Rock

Assessor's Parcel Number(s)  
481-38-017

## STAFF REPORT

### PROJECT DESCRIPTION

Completed by: Deanna Chow

Location: North side of Story Road, approximately 610 feet easterly of King Road

Gross Acreage: 0.74

Net Acreage: 0.74

Net Density: n/a

Existing Zoning: CP –  
Commercial  
Pedestrian

Existing Use: Fast food restaurant

Proposed Zoning: No Change

Proposed Use: Operation of an existing, legal nonconforming drive-through use (Jack the Box) between the hours of 12 midnight and 6 AM (24-hour use).

### GENERAL PLAN

Completed by: DC

Land Use/Transportation Diagram Designation:  
General Commercial with a Neighborhood Business District Overlay

Project Conformance:  
☒ Yes ☐ No  
☒ See Analysis and Recommendations

### SURROUNDING LAND USES AND ZONING

Completed by: DC

North: Commercial

CN- Commercial Neighborhood

East: Commercial

CP – Commercial Pedestrian

South: Commercial

CN – Commercial Neighborhood

West: Commercial

CN – Commercial Neighborhood

### ENVIRONMENTAL STATUS

Completed by: DC

☐ Environmental Impact Report  
☐ Negative Declaration

☒ Exempt  
☐ Environmental Review Incomplete

### FILE HISTORY

Completed by: DC

Annexation Title: Hillview No\_ 22

Date: December 9, 1960

### PLANNING DEPARTMENT RECOMMENDATIONS AND ACTION

☐ Approval  
☒ Approval with Conditions  
☐ Denial

Date: \_\_\_\_\_

Approved by: \_\_\_\_\_  
☐ Action  
☐ Recommendation

### APPLICANT

Jack in the Box  
5994 W. Las Positas Blvd., Ste. 101  
Blossington, CA 94598

### CONTACT

Virginia Fanelli  
5958 Dry Oak Dr.  
San José, CA 95120

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**PUBLIC AGENCY COMMENTS RECEIVED**

Completed by: DC

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Department of Public Works

No comments.

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Other Departments and Agencies

See attached for comments from the Police Department, Fire Department and Environmental Services Department

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**GENERAL CORRESPONDENCE**

None received.

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**ANALYSIS AND RECOMMENDATIONS**

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**BACKGROUND**

The applicant (Jack in the Box) is requesting a Conditional Use Permit (CUP) to allow for the 24-hour use of a legal non-conforming drive-through use at an existing fast food restaurant located at the subject location. The restaurant portion would remain closed during the proposed extended operating hours. No other changes are being proposed with this permit.

The existing drive-through is a legal non-conforming use, approved in 1966 with an Architectural and Site Approval. Although legally permitted and approved, the drive-through use is not allowed in the CP Commercial Pedestrian Zoning district that has been in effect on the property since 2001. The proposed 24-hour use is considered an expansion and intensification of a legal non-conforming use, and therefore requires a Conditional Use Permit.

Since November 30, 1984, the Zoning Ordinance has required a Conditional Use Permit for operation of a commercial use between 12:00 a.m. and 6:00 a.m. In 1992, the applicant received a Notice of Violation for operating 24-hours without a CUP. Although late night uses were permitted by Code in 1966 at the time of approval of the original permit to allow a drive-through, there is no evidence of legal non-conforming status for 24-hour operation of this facility. The applicant ceased operations between 12:00 midnight and 6:00 a.m. and then filed for a Conditional Use Permit application to operate between those hours legally. The applicant subsequently withdrew the application. More recently, in 2002, Jack in the Box received a Notice of Violation for operating 24-hours without a Conditional Use Permit. In response, this Conditional Use Permit application proposes 24-hour use of the drive-through at this location.

### Site and Surrounding Uses

The subject property is located along Story Road, approximately 610 feet east of King Road. The site contains a 1,430 square foot Jack in the Box restaurant with an existing drive-through and associated parking lot. Surrounding uses include a large multi-tenant commercial center to the west, commercial uses to the north, and a vacant, fire-damaged commercial building to the east. The nearest residential use is approximately 130 feet to the north of the property line and approximately 155 feet from the restaurant's order board. All vehicular access to the restaurant is from Story Road.

### **ENVIRONMENTAL REVIEW**

The Director of Planning, Building and Code Enforcement has determined that this project is exempt from environmental review under provisions of the California Environmental Quality Act pursuant to Section 15301. Under this section, projects that involve little or no expansion of existing facilities qualify for an exemption. The project is exempt since the project proposes no physical expansion to the building or an increase in seating capacity.

### **GENERAL PLAN CONFORMANCE**

The subject parcel is designated General Commercial on the *San José 2020 General Plan* Land Use/Transportation Diagram with a Neighborhood Business District (NBD) Overlay. The existing restaurant with a drive-through permitted in 1966 predates the establishment of the NBD overlay designation at this location. The General Commercial designation is a non-specialized commercial designation, which includes commercial areas along major thoroughfares as well as freestanding commercial establishments. The proposed allowance for operation of this commercial drive-through use between midnight and 6 a.m. is consistent with the existing General Plan land use designation.

### **ANALYSIS**

The proposed project generally conforms to the City Council Policy and staff believes findings can be made to support the expansion of the legal non-conforming use.

The Council Policy for the Evaluation of 24-Hour Uses is intended to assure compatibility of late night and early morning uses with surrounding land uses. The Policy provides criteria for evaluating 24-hour uses and measures to reduce their potential negative impacts on neighboring land uses. The Policy considers the restaurant a "take out restaurant" which have the potential for problems when operating 24-hours. Loitering, noise, and litter are frequently concerns associated with 24-hour, take-out restaurant operations. Under the Policy, all 24-hour restaurants are evaluated on a case-by-case basis.

The following criteria were evaluated: area use compatibility, use separation, noise and outdoor activities, and police issues:

#### Area Use Compatibility and Use Separation

The Policy states that 24-hour uses should not be approved unless the facility can operate without detriment to nearby residential uses or the general welfare of the surrounding area. Physical separation of incompatible uses is the best means to avoid potential conflicts, and the policy states that 24-hour uses should not generally be located within 300 feet of any property residentially zoned, planned or used. The site is located within approximately 110 feet of the nearest residential property line. (See photo at right). There is, however, a parking lot serving commercial uses between the nearest residential property and the subject site. As a result of the absence of a roadway or structure between the drive-through lane and the nearest residential use, the project as originally proposed is inconsistent with the 24-hour policy in regards to providing an adequate buffer for the residences.



*Existing Jack in the Box menu board at the rear of subject site, neighboring commercial property and residential units on opposite side of commercial parking lot. (110 feet from rear property line)*

In response to this issue, the applicant is proposing to construct a 6-foot masonry wall along the rear property line and remove the existing menu board currently located at the rear property line. Pedestrian access will be maintained between this site and the neighboring commercial property. The 6-foot wall would be effectively 8 or more feet tall in relation to the neighboring parking lot and the residential uses beyond as a result of the grade difference between the subject and the neighboring site. The addition of the proposed masonry wall will provide good sound attenuation similar to a structure, in addition to the existing eight- (8) foot concrete block wall at the residential property line. The mitigation measures are indicated in a note on the site plan and staff has included a revised plan condition to fully incorporate the changes into the project plans.

Additionally, the removal of the menu board from the rear property line will alleviate the impact from cars idling and stacking while viewing the menu prior to ordering. Only one menu board will remain that is located approximately 155 feet from the residential property line to the north proximate to the restaurant. These measures should help minimize potential disturbance to nearby residences resulting from the late night operations of the drive-through lane.

#### Noise and Outdoor Activities

The City Council Policy specifies that it is important to minimize noise impacts from late night activities. Amplified sound from drive-through speakers, loitering in the parking lot, and cars running with radios are potential concerns. The applicant will be required to reduce speaker volume and prohibit the use of the parking

lot for customers during late night hours which will help reduce the potential for loitering and provide some security for patrons. Additionally, the proposed 24-hour operation is limited to the drive-through portion only, which should alleviate potential loitering.

### Police Issues

The San José Police Department has reviewed the request for after-midnight operation and as indicated in the attached e-mail correspondence, does not object to the granting of the Conditional Use Permit. However, the Department will review crime data in the six- (6) months following the permit issuance to determine if there are any crime patterns associated with the new after-hours operation of the drive-through. Crime statistics (between 1/2002 and 1/2004) were reviewed and there was not considered to be an unusual amount of activity for this area. However, the Police Department noted there were a significant number (26) of “911” calls from the pay phone on site, most of which were determined to be unfounded, or no person was onsite upon arrival of the police. In response to the Police Department’s recommendation, the application is willing to relocate the pay phone to a more visible location or remove it from the site. Staff is recommending as a condition of approval that the phone be removed from the site to minimize false calls, and because the phone’s existing location is in non-conformance with the Zoning Ordinance

### Expansion of a Legal Non-Conforming Use

Expansion of the use to 24-hour operation is appropriate if findings can be made that the use does not significantly increase any identified impact such as traffic, on-street parking or noise. The proposed project is requesting an extension of the operating hours for the drive-through only and does not intend to add any seating capacity to the restaurant. No additional parking is required and staff believes that there would not be a significant traffic increase associated with a late night operation. Noise is a potential concern; however, the proposed 6-foot masonry wall, low volume speakers, prohibition of parking in the lot between 12:00 a.m. and 6:00 a.m., and the removal of the menu board closest to the residences would provide appropriate mitigation. Staff believes that the 24-hour use of the existing drive-through would not significantly increase any identified impacts.

### Conclusion

The proposed use has been evaluated based on present conditions and recent crime statistics. Based on the above analysis, staff recommends approval of the proposed Conditional Use Permit with staff recommended conditions. The project, as conditioned, allows for the 24-hour operation of the drive through use to serve the community and addresses potential issues that may arise from late night use.

## **PUBLIC OUTREACH**

A public hearing notice was distributed to owners and occupants of all properties located within a 500 foot radius of the project site. Staff presented this project to the East Valley/680 Communities Strong Neighborhood Initiatives Neighborhood Advisory Committee (NAC) during their March 2004 meeting. Members expressed general concern about noise and loitering but no specific concern about the traffic. Staff has been available to discuss the project with interested members of the public.

## RECOMMENDATIONS

Planning staff recommends that the Planning Commission approve the requested Conditional Use Permit and include the following facts and findings in its Resolution.

1. This site has a designation of General Commercial and Neighborhood Business District Overlay on the adopted San José 2020 General Plan Land Use/Transportation Diagram.
2. The project site is located in the CP - Commercial Pedestrian Zoning District, which allows restaurant use as a permitted use and after midnight operations (24-hour use) subject to approval of a Conditional Use Permit .
3. The existing drive-through is a legal non-conforming use.
4. The project is consistent with the existing pattern and character of the neighborhood, and the site has been and will be used in conformance with the zoning designation of the site.
5. The project site is located on a .74-acre site at the north side of Story Road, approximately 610 feet easterly of King Road.
6. The site is generally surrounded by commercial uses with residential uses within approximately 110 feet.
7. The project was found to be exempt from environmental review under Section 15301 of the CEQA Guidelines, which exempts projects with existing facilities involving little or no expansion of an existing use. The project proposes no addition to the existing building, nor an increase in seating capacity.
8. The proposed project will not individually or cumulatively have an adverse effect on wildlife resources, as defined in Section 711.2 of the California Department of Fish and Game Code.
9. The applicant proposes operation between 12:00 a.m. to 6:00 a.m. for only the drive-through portion of the restaurant.
10. The City Council has adopted a *Policy (6-27) – Evaluation of 24-Hour Uses*. That Policy contains General Guidelines that includes the following: area use compatibility, use separation, outdoor activities, police issues, noise, and mitigation management plan. The separation of uses is identified as an important guideline to minimize potential impacts on residential or other sensitive neighboring uses.
11. The Police Department did not object to granting 24-hour uses, but will review the crime statistics after 6 months to determine if there are any crime patterns associated with the proposed use.
12. The project includes mitigation measures to help reduce potential impacts such as noise, littering, and loitering.

This Planning Commission concludes and finds, based upon an analysis of the above facts that:

1. The proposed project will be consistent with the adopted San José 2020 General Plan Land Use/Transportation Diagram of the City of San José.
2. The proposed project complies with all applicable provisions of the Zoning Ordinance.
3. The proposed project is in compliance with the California Environmental Quality Act.
4. The proposed project is consistent with the intent of the Council Policy 6-27 for Evaluation of 24-Hour Uses.
5. The project will not have any adverse effects on public health, safety or welfare and will not be materially injurious to adjacent properties or improvements.

Finally, based upon the above-stated findings and subject to the conditions set forth below, the Planning Commission finds that:

1. The proposed use at the location requested will not
  - a. Adversely affect the peace, health, safety, morals or welfare of persons residing or working in the surrounding area; and will
  - b. Impair the utility or value of property of other persons located in the vicinity of the site; or
  - c. Be detrimental to public health, safety or general welfare; and
2. The proposed site is adequate in size and shape to accommodate the yards, walls, fences, parking and loading facilities, landscaping and other development features prescribed in this title, or as is otherwise required in order to integrate said use with the uses in the surrounding areas; and
3. The proposed site is adequately served:
  - a. By highways or streets of sufficient width and improved as necessary to carry the kind and quality of traffic such use would generate; and
  - b. By other public or private service facilities as are required.

In accordance with the findings set forth above, a Conditional Use Permit to use the subject property for said purpose specified above and subject to each and all of the conditions hereinafter set forth are hereby granted. This Planning Commission expressly declares that it would not have granted this permit except upon and subject to each and all of said conditions, each and all of which conditions shall run with the land and be binding upon the owner and all subsequent owners of the subject property, and all persons who use the subject property for the use conditionally permitted hereby.

## CONDITIONS PRECEDENT

This Conditional Use Permit shall have no force or effect and the subject property shall not be used for the hereby permitted uses unless and until all things required by the below-enumerated precedent conditions shall have been performed or caused to be performed and this Resolution has been recorded with the County Recorder.

1. **Acceptance and Payment of Recording Fees.** The "Acceptance of Permit and Conditions" form shall be signed, notarized, and returned to the Department of City Planning within 60 days from the date of issuance of the resolution granting the permit. *Failure to do so will result in this permit automatically expiring regardless of any other expiration date contained in this permit.* Fees for recording a Certificate of Permit with the Recorder for the County of Santa Clara must be submitted along with the Acceptance Form.
2. **Plan Revisions.** Within 60 days of the issuance of this permit and prior to recordation, the applicant shall revise the project plans to include the item(s) listed below to the satisfaction of the Director of Planning. Failure to provide said revisions within 60 days shall render this permit null and void.
  - a. Provide detail and location of the proposed 6-foot masonry wall at the real property line. A landscape buffer, minimum 3 feet in width, shall be included, and plan must show the types of trees, shrubs and plant material proposed.
  - b. Modify the Plans to indicate the deletion of the menu board and pay phone on the revised plans.

## CONCURRENT CONDITIONS

The subject property shall be maintained and utilized in compliance with the below-enumerated conditions throughout the life of the permit:

1. **Conformance with Plans.** The proposed 24 hours use shall apply only to Jack in the Box as shown on the approved plans entitled, "Conditional Use Permit for Jack in the Box", dated May 26, 2004, on file with the Department of Planning, Building, and Code Enforcement and to the San José Building Code (San José Municipal Code, Title 24). All proposed mitigation measures shall be implemented and maintained.
2. **Nuisance.** This use shall be operated in a manner that does not create a public or private nuisance. Any such nuisance must be abated immediately upon notification from the City of San José.
3. **Landscaping.** Landscaped areas shall be maintained and watered and all dead plant material is to be removed and replaced by the property owner. Irrigation is to be maintained in accordance with Part 4 of Chapter 15.10 of Title 15 of the San José Municipal Code, Water Efficient Landscape Standards for New and Rehabilitated Landscaping and the City of San José Landscape and Irrigation Guidelines.
4. **Lighting.** Any new on-site lighting shall use Low-Pressure Sodium fixtures and be designed, controlled and maintained so that no light source is visible from outside of the property.
5. **Refuse.** All trash areas shall be effectively screened from view, covered and maintained in an orderly state. No outdoor storage is allowed/permitted unless designated on the approved plan set. Trash areas shall be



maintained in a manner to discourage illegal dumping.

6. **Litter Control.** The applicant shall control the litter emanating from the site on a daily basis for a distance of 300 feet along public streets from the site.
7. **Exterior Clean Up.** Exterior clean up and maintenance activities including garbage pick up shall not occur later than 10:00 p.m. or prior to 7:00 a.m.
8. **Parking.** The applicant shall erect signage prohibiting parking and loitering on the site between 12 midnight and 6 a.m.
9. **Police Liaison.** The applicant shall maintain a liaison with the Police Department to effectively control crime, gang, drug and other police problems that may arise from the operation between 12:00 a.m. and 6:00 a.m.
10. **Anti-Graffiti.** The applicant shall remove all graffiti from buildings and wall surfaces within 24 hours of defacement.
11. **Sign Approval.** No signs are approved at this time. All proposed signs shall be subject to approval by the Director of Planning, Building and Code Enforcement.
12. **Hours of Operation.** Only the drive-through portion of the restaurant is allowed to operate between midnight and 6 am. The main restaurant can operate between the hours of 6:00 a.m. and 12:00 a.m. During the extended hours, no public access is permitted to the main restaurant. No outdoor waiting or seating areas are approved with this project.
13. **Noise.** Noise levels shall not exceed 60 decibels at the closest property line.
14. **Amplified Sound.** Only Low-volume drive-through speakers shall be used between the hours of 10:00 p.m. and 7:00 a.m.
15. **Utilities.** All on-site telephone, electrical and other overhead service facilities shall be placed underground to the satisfaction of the Director of Planning.
16. **Source Control.** The proposed facility must conform to the City of San José's industrial waste discharge regulations (In accordance with the San José Municipal Code, Chapter 15.14 – Industrial Waste Discharge Regulations). Any non-domestic wastewater discharge into the sanitary sewer system will require Source Control staff review and approval.

## CONDITIONS SUBSEQUENT

1. **Revocation, Suspension, Modification.** This Conditional Use Permit may be revoked, suspended or modified by the Planning Commission, or by the City Council on appeal, at any time regardless of who is the owner of the subject property or who has the right to possession thereof or who is using the same at such time, whenever, after a noticed hearing in accordance with Part 3, Chapter 20.44, Title 20 of the San José Municipal Code it finds:

- a. A violation of any conditions of the Conditional Use Permit was not abated, corrected or rectified within the time specified on the notice of violation; or
- b. A violation of any City ordinance or State law was not abated, corrected or rectified within the time specified on the notice of violation; or
- c. The use as presently conducted creates a nuisance.

cc: Jack in the Box, 5994 W. Las Positas Blvd., Ste. 101, Pleasanton, CA 94588  
Virginia Fanelli, 5958 Dry Oak Drive, San José, CA 95120  
Officer William Miller, Police Department